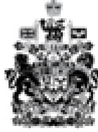

Citation: *AB v Canada Employment Insurance Commission*, 2023 SST 1417

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	A. B.
Respondent:	Canada Employment Insurance Commission
Representative:	Josée Lachance

Decision under appeal:	General Division decision dated February 17, 2023 (GE-22-3884)

Tribunal member:	Janet Lew
Type of hearing:	In person and Videoconference
Hearing date:	July 19, 2023 and September 19, 2023
Hearing participants:	Appellant Respondent's representative
Decision date:	October 26, 2023
File number:	AD-23-253

Decision

[1] The appeal is dismissed.

Overview

[2] The Appellant, A. B. (Claimant), a senior public service employee, is appealing the General Division decision.

[3] The General Division found that the Respondent, the Canada Employment Insurance Commission (Commission), proved that the Claimant had been suspended from his employment from November 23, 2021, to June 3, 2021, and then dismissed, effective June 9, 2022, because of misconduct. The Claimant had not complied with his employer's vaccination policy.

[4] As a result, the Claimant was disentitled from receiving Employment Insurance benefits for the duration of the suspension, and then disqualified as of June 5, 2022.

[5] The Claimant argues that the General Division made legal and factual errors. The Claimant argues that his employer's vaccination policy was unreasonable and unconstitutional, so he says that he should not have been expected to comply. He also says his employer could not impose these new conditions of employment without his consent.

[6] Besides, the Claimant says that his employer's vaccination policy fell outside the terms and conditions of his collective agreement. He says that he was fully compliant with the duties required of him under his collective agreement. So, he says that there was no misconduct. He argues that misconduct only arises if there is a breach of a duty arising out of his employment contract.

[7] The Claimant also argues that there was no misconduct because his employer reinstated him to his former position, without any loss of seniority. He says that this should be treated as if he had never been suspended nor dismissed from his employment.

[8] The Claimant asks the Appeal Division to allow the appeal and to find that there was no misconduct.

[9] The Commission argues that the General Division did not make any errors. The Commission says that the evidence supports the General Division's findings that the Claimant was aware of the employer's vaccination policy, and that if he did not comply with the employer's policy, that he would be suspended and then eventually dismissed from his employment. The Commission asks the Appeal Division to dismiss the appeal.

Preliminary matters

[10] The Claimant filed a grievance against his employer. The Claimant settled his grievance, resulting in a settlement agreement.

[11] The Claimant agreed with his employer that he would keep the details of the settlement and the terms of the release strictly confidential. He further agreed that he would not disclose any information with respect to either the release or settlement.

[12] In a hearing held on July 19, 2023, the Claimant argued that the terms of the settlement of his grievance proved that there had been no misconduct. The Commission was prepared to reconsider whether the Claimant had engaged in misconduct. However, it required details of the Claimant's settlement with his employer.

[13] The hearing of the appeal was adjourned to give the Claimant a chance to contact his employer, in an effort to secure the release of documents relating to his settlement of the grievance.

[14] The Claimant's employer let the Claimant produce the settlement agreement and release, on conditions. The names of any participants to the settlement were to be removed from any decisions of the Social Security Tribunal to protect privacy. Also, any documents in his file would not be subject to any Access to Information and Privacy (ATIP) requests.

[15] As a matter of policy, the Social Security Tribunal removes identifying information of claimants and any added parties (unless it is irrelevant to the decision) before

providing public access to those documents. The appeal record generally includes the parties' documents and submissions. Identifying information includes names, addresses, dates of birth, and any other information in the appeal record that could lead a person who is not involved in the proceedings to identify the claimant or added party.

[16] On behalf of his employer, the Claimant is seeking a confidentiality order over the settlement agreement, release, and all documents within his file. He is also asking that his name and the employer's name be removed from the decision. He says that the release of any of this information will injure his employer's interests as there are ongoing grievances by other employees, who could use this information against the employer.

[17] The Claimant's employer agreed to allow the Claimant to release this information on the expectation that the settlement agreement and the release would not be subject to any ATIP requests.

[18] A confidentiality order is not required to remove the names of the Claimant and his employer from the decision. The Tribunal automatically removes these without the need for a confidentiality order.

[19] I am issuing the following orders:

- I find the balance of the Claimant's request overly broad. I am not granting a confidentiality order over all of the documents in the hearing file.
- I am granting a confidentiality order over the settlement agreement and the release between the Claimant and his employer.

[20] I am granting a confidentiality order over the settlement agreement and the release, bearing in mind the principles set out in the *Sierra Club of Canada*[1] case. There, the Supreme Court of Canada established that the fundamental question to

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[1] *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 (CanLII), [2002] 2 SCR 522, at para 53.

consider in an application for a confidentiality order is whether the right to freedom of expression should be compromised in the circumstances.

[21] The Court held that there are limited circumstances when a confidentiality should be granted. Such an order should be granted only when:

(1) Such an order is necessary to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and

(2) The salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[22] The limited confidentiality order that I am granting meets these conditions.

Issues

[23] The issues in this appeal are as follows:

a) Can the Appeal Division consider the Claimant's settlement with his employer?

b) Did the General Division misinterpret what misconduct means?

Analysis

[24] The Appeal Division may intervene in General Division decisions if the General Division made any jurisdictional, procedural, legal, or certain types of factual errors.[2]

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[2] See section 58(1) of the *Department of Employment and Social Development Act*.

Can the Appeal Division consider the Claimant's settlement with his employer?

[25] The Claimant filed a grievance against his employer regarding the termination of his employment. He settled the grievance. He has since been reinstated to his former position, without any loss of seniority. Notably, all documentation regarding his termination would be removed from his personnel files. The Claimant says the settlement shows that there was no misconduct.

[26] However, the Commission argues that the Appeal Division should not accept this evidence. The Commission says that this evidence represents new evidence that the General Division did not have before it. The Commission argues that the Appeal Division is limited to the evidence that the General Division had.

[27] The Commission says that the Appeal Division is not allowed to consider new evidence, even if that evidence could change the outcome. The Commission argues that the evidence does not change the outcome in any event.

[28] The Appeal Division generally does not accept new evidence, unless that evidence shows there were procedural irregularities at the General Division, or if that evidence were to provide general background information. The Claimant's settlement with his employer does neither: it does not give any general background information and it does not show any procedural irregularities. Therefore, I cannot consider this evidence.

[29] The Commission notes that, once this appeal is concluded, if need be, the Claimant could submit this documentation to it under section 111 of the *Employment Insurance Act*. Section 111 lets the Commission rescind or amend a decision in a claim for benefits if new facts are presented.

[30] So, the Commission could make a decision and decide whether the Claimant's grievance settlement has any impact on the misconduct question. If the Commission were to maintain its position on reconsideration, the Claimant could then file an appeal with the General Division.

Did the General Division misinterpret what misconduct means?

[31] The Claimant argues that the General Division misinterpreted what misconduct means.

[32] The Claimant says that misconduct does not arise if it involves having to comply with a policy that (a) is not part of the original employment contract or collective agreement, or (b) is unreasonable or unconstitutional.

(a) The policy was not part of the claimant's employment contract

[33] The Claimant denies that he committed any misconduct. He says that he did not have to comply with his employer's vaccination policy because it fell outside the terms and conditions of his collective agreement.

[34] The Claimant argues that his employer was not allowed to impose new conditions of employment without his consent, particularly if those conditions are unreasonable or unconstitutional. He notes that his union did not consent to nor agree with the vaccination policy.

[35] The Claimant denies that he committed any misconduct when he did not get vaccinated. He claims that he fulfilled all of the duties set out in his collective agreement. He also complied with his employer's code of conduct.

– The Claimant relies on *AL v Canada Employment Insurance Commission*

[36] The Claimant relies in part on a decision issued by the General Division, a case called *A.L.*[3] The General Division found that there was no misconduct in that case because the employer had unilaterally introduced a vaccination policy without consulting employees and getting their consent.

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[3] *A.L. v Canada Employment Insurance Commission*, 2022 SST 1428.

[37] However, the Appeal Division has since overturned the General Division's *A.L.* decision.[4] The Appeal Division found that the General Division overstepped its jurisdiction by examining A.L.'s employment contract.

[38] The Appeal Division also found that the General Division made legal errors. The General Division made an error when it declared that an employer could not impose new conditions to the collective agreement. The Appeal Division found that the General Division also made an error when it decided that there had to be a breach of the employment contract for misconduct to arise.[5]

– **Review of *Kuk***

[39] The Federal Court has since addressed the issue regarding a claimant's employment contract in the context of vaccine mandates.

[40] In *Kuk*,[6] Mr. Kuk chose not to comply with his employer's vaccination policy. Mr. Kuk argued that the Appeal Division made an error in finding that he breached his contractual obligations by not getting vaccinated. He denied any misconduct.

[41] The Court wrote:

> [34] . . . **As the Federal Court of Appeal held in *Nelson*, an employer's written policy does not need to exist in the original employment contract to ground misconduct**: see paras 22-26. A written policy communicated to an employee can be in itself sufficient evidence of an employee's objective knowledge "that dismissal was a real possibility" of failing to abide by that policy. The Applicant's contract and offer letter do not comprise the complete terms, express or implied, of his employment… It is well accepted in labour law that employees have obligations to abide by the health and safety policies that are implemented by their employers over time.
>
> . . .
>
> [37] Further, unlike what the Applicant suggests**, the Tribunal is not obligated to focus on contractual language** or determine if the claimant was dismissed justifiably under labour law principles when it is considering

[4] *Canada Employment Insurance Commission v A.L.*, 2023 SST 1032.
[5] A.L. is now appealing the Appeal Division's decision to the Federal Court of Appeal (file number A-217-23).
[6] *Kuk v Canada (Attorney General)*, 2023 FC 1134.

> misconduct under the [*Employment Insurance Act*]. Instead, as outlined above, **the misconduct test focuses on whether a claimant intentionally committed an act (or failed to commit an act) contrary to their employment obligations**.
>
> (My emphasis)

[42] The Federal Court found that the vaccination requirements did not have to be part of the employment agreement. As long as Mr. Kuk knowingly did not comply with his employer's vaccination policy, and knew what the consequences would be, misconduct would arise.

– **The Claimant argues that Kuk does not apply in his case**

[43] The Claimant argues that the principles set out in *Kuk* should not apply in his case. He says that there are significant factual differences between his case and *Kuk*, as follows:

- Unlike Mr. Kuk, he never had to produce an immunization record or provide private medical information as a condition of his employment.
- His union never ratified the employer's vaccination policy and the policy never formed part of his collective agreement. He never consented to the vaccination policy. He argues that the vaccination policy was not legally valid or binding because he did not consent to it.
- He followed his employer's code of conduct and fulfilled his duties as defined in his collective agreement.
- He says that his conduct was not careless or negligent and did not have any effect on his job performance. He denies that his conduct impaired the performance of the duties that he owed to his employer.

- His employer never classified or described his actions as misconduct. He returned to work with a clean employment record. His employer removed any record of any alleged misconduct.[7]

– **Review of other court cases**

[44] In *Nelson*[8] (referred to by the Court in *Kuk*), the applicant lost her employment because of misconduct under the *Employment Insurance Act*. The Federal Court of Appeal found that, contrary to the terms of her employment, Ms. Nelson was seen publicly intoxicated on the reserve.

[45] Ms. Nelson argued that the Appeal Division made a mistake in finding that her employer's alcohol prohibition was a condition of employment causally linked to her job.

[46] Ms. Nelson argued that there was no rational connection between her consumption of alcohol and her job performance, particularly as she had consumed alcohol off duty and during her private time and there was nothing to suggest that she had arrived at work intoxicated or impaired. She denied that there was an express or implied term of her employment contract that prohibited alcohol on the reserve.

[47] The Federal Court of Appeal wrote, " …, in my view, it is irrelevant that the Employer's alcohol prohibition existed only as a term of employment under its policies, not in any written employment contract …"[9] In other words, the policy did not have to be in the employment agreement.

[48] Similarly, in a case called *Nguyen*,[10] the Court of Appeal found that there was misconduct. Mr. Nguyen harassed a work colleague at the casino where they worked. The employer had a harassment policy. However, the policy did not describe Mr. Nguyen's behaviour, and did not form part of the employment agreement.

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[7] Claimant's submissions, at AND 12-6.
[8] *Nelson v Canada (Attorney General)*, 2019 FCA 222.
[9] *Nelson*, at para 25.
[10] *Canada (Attorney General) v Nguyen*, 2001 FCA 348 at para 5.

[49] In another case, called *Karelia*,[11] the employer imposed new conditions on Mr. Karelia. He was always absent from work. These new conditions did not form part of the employment agreement. Even so, the Court of Appeal determined that Mr. Karelia had to comply with them—even if they were new—otherwise there was misconduct.

– **The General Division has a limited role in the issues it can examine**

[50] Despite the Claimant's arguments, it is clear from the authorities that I have cited above that an employer's policy does not have to form part of the employment agreement for there to be misconduct. The issue of an employees' consent was not a relevant consideration.

[51] As the courts have consistently stated, the test for misconduct is whether a claimant intentionally committed an act (or failed to commit an act), contrary to their employment obligations. It is a very narrow and specific test.

(b) The Claimant says the policy was unreasonable and illegal

[52] The Claimant also argues that misconduct does not arise if it involves having to comply with a policy that is unreasonable or unconstitutional. The Claimant was concerned about the safety of the vaccines. He was aware that Health Canada had identified safety risks with vaccination, including serious injury and death. He notes that there have been over 55,000 reported adverse reactions, with widely varying degrees of severity, and four deaths causally linked to vaccination.

[53] The Claimant says his employer's policy failed to provide alternatives or accommodation. He says his employer could have easily accommodated him. He could have continued working from home. That way, he could have continued performing all of his duties.

[54] In a case called *Cecchetto v Canada (Attorney General)*,[12] Mr. Cecchetto's employer introduced a vaccination policy. Mr. Cecchetto questioned the efficacy and

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[11] *Karelia v Canada (Human Resources and Skills Development)*, 2012 FCA 140.
[12] *Cecchetto v Canada (Attorney General)*, 2023 FC 120.

safety of the COVID-19 vaccines. He questioned the legality of the vaccination policy that his employer adopted. He said there were legitimate reasons to refuse vaccination. He argued that he should be able to make personal medical decisions. So, if he chose not to get vaccinated, he says that that should not have been construed as misconduct.

[55] The Federal Court said neither the General Division nor the Appeal Division have any authority to assess or rule on the merits, legitimacy, or legality of the vaccination policy.[13] The Court also determined that the Appeal Division has a limited role in what it can do. It is restricted to determining why a claimant is dismissed from their employment and whether that reason constitutes misconduct.

[56] The Claimant argues that *Cecchetto* does not apply to his case because it is factually distinguishable. He says that unlike in *Cecchetto*, his employer failed to provide him with any options. He notes that Mr. Cecchetto had the option of testing, which would have enabled him to continue working. Also, Mr. Cecchetto worked in a healthcare setting. The Claimant does not work in the medical profession. He is a scientist who could have continued working remotely during the pandemic.

[57] Despite these factual differences, I find that *Cecchetto* remains applicable. The Court articulated a set of broad, guiding principles that apply in the misconduct context, irrespective of whether an employee works in the healthcare setting or in another industry, and irrespective of whether an employer provides options to avoid vaccination.

[58] It is clear from *Cecchetto* that the Claimant's arguments about the legality and reasonableness of his employer's vaccination policy are irrelevant to the misconduct question. They are beyond the scope of the General Division's authority to consider. For that reason, the General Division did not make an error when it decided that it could focus only on what the Claimant did or failed to do and whether that amounted to misconduct under the *Employment Insurance Act*.

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[13] *Cecchetto v Canada (Attorney General)*, 2023 FC 102 at para 48.

[59] Finally, the issue about whether the Claimant's employer could have provided an accommodation is irrelevant to the misconduct question.[14]

[60] This is not to say that the Claimant is without his options, but any recourse to challenge his employer's vaccination policy lies elsewhere.

Conclusion

[61] The appeal is dismissed.

Janet Lew
Member, Appeal Division

[14] *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 at para 17.